Filed 8/24/04 Kreis v. Sampley CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JANET KREIS,

Plaintiff and Respondent,

v.

GARY L. SAMPLEY,

Defendant and Appellant.

F044796

(Super. Ct. No. CV247538)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Robert J. Anspach, Judge.

Gregory H. Mitts for Defendant and Appellant.

Law Offices of Roger R. Meadows and Roger R. Meadows for Plaintiff and Respondent.

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Janet Kreis sued Gary Sampley for professional negligence after she hired Sampley to represent her in an action against Kern County and one of its employees. Judgment was entered in Kreis's favor in the amount of $42,500 after a one-day court trial.

Sampley argues the judgment must be reversed because Kreis failed to present expert witness testimony and because there was inadequate evidence that Kreis was damaged by Sampley's negligence. We affirm the judgment because the trial was not reported, thus precluding review of these arguments.

FACTUAL AND PROCEDURAL SUMMARY

The parties waived their right to have a court reporter transcribe the proceedings. There is, therefore, no reporter's transcript of the trial. Also, there is no settled statement. The following "facts" appear in some of the documents filed in this case.

Kreis apparently was sentenced to jail at the Kern County Sheriff's detention facility at Lerdo for attempting to smuggle drugs into the jail. While incarcerated, Kreis claimed she was sexually abused by one of the guards, Brian Kent Eddy. After her release from jail, Kreis retained Sampley to represent her in a suit against Kern County and Eddy. Sampley did not file suit on behalf of Kreis, thus allowing the statute of limitations to expire.

The minute order from the trial indicates that a one-day court trial of the allegations occurred on July 17, 2003. A jury was waived. Eighteen exhibits were received into evidence, one of which was an apparent agreement between Kreis and Sampley for Sampley to provide legal services to Kreis. Kreis testified on her own behalf, along with Sampley and Harry Kreis. Neither party requested a statement of decision.

On July 31, 2003, the court issued a minute order inviting the parties to brief the issue of whether "the standard of care at issue in this case requires expert testimony." Both parties submitted briefs on the issue.

The trial court's ruling stated in full:

> "Plaintiff hired Sampley by written contingent fee agreement dated August 23, 2000, to represent her in connection with a tort claim against Kern County, and one Brian Kent Eddy. Eddy was a prison guard who sexually

assaulted her while she was incarcerated at the Lerdo jail. Ms. Kreis was released from jail on September 17, 1999.

"Pursuant to [Code of Civil Procedure section] 352.1, the statute of limitations was tolled until her release from the facility. The defendant therefore had twenty four days from the time he was engaged, to bring suit against the county and against the individuals involved in the sexual abuse of the plaintiff.

"To avoid the claims requirements and exclusion of [Code of Civil Procedure section] 352.1[, subdivision] (b), Sampley could have filed in state court a cause of action for damages for civil rights violations under section 1983 of title 42 of the United States Code. [(*Williams v. Horvath* (1976) 16 Cal.3d 834.)]

"However, the plaintiff did not file any suit against the County of Kern and the perpetrator of the sexual assaults.

"Defendants failure to file suit within the period of limitations constitutes a failure to use due care and skill ordinarily exercised in like cases by members of the legal profession practicing in Kern County under similar circumstances.

"Plaintiff to recover judgment against the defendant in the sum of $42,500.00 together with costs of suit.

"Since neither plaintiff or defendant have requested a statement of decision, a statement is not required. [Code of Civil Procedure §] 632."

The judgment acknowledges the trial, the appearance of the parties and their attorneys, and orders Kreis "recover from the defendants Gary L. Sampley and Gary L. Sampley, d/b/a/ The Law Office of Gary L. Sampley, the sum of $42,500.00 together with costs of suit …."

DISCUSSION

Sampley argues the judgment must be reversed for two reasons. First, he contends the absence of expert testimony precludes Kreis's recovery. Second, he contends the trial court erred by failing to follow the "trial within a trial" model typically used in professional negligence actions. Both arguments must be rejected because of the absence of a reporter's transcript of the proceedings or a settled statement.

It is Sampley's obligation to show affirmatively that an error occurred in the trial court by an adequate record. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 518, pp. 562-563; *Berg v. Investors Real Estate Loan Co.* (1962) 207 Cal.App.2d 808, 818.) As this court recently stated, one of the immutable rules of appellate practice is that if it is not in the record, it did not happen. (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.) In this case, a corollary to this rule applies: If there is no reporter's transcript or settled statement, we assume the judgment is supported by substantial evidence and the trial court's findings are correct. (*Berg,* at p. 813.)

Sampley's arguments ask us to make various presumptions about what occurred in the trial court. His first argument, that plaintiff did not present any expert testimony, is a presumption we cannot make. Sampley testified at trial. Undoubtedly, he could qualify as an expert witness. He may have admitted at trial that he violated the standard of care by failing to file timely a complaint. He also may have opined about the value of Kreis's action and the viability of recovery against both Kern County and Eddy.

We are not saying that Samply testified to these matters at trial. Our point is that, in the absence of a reporter's transcript or a settled statement, we presume the trial court's findings are correct. The fact that Sampley may have testified to such matters mandates that we follow the presumption and precludes reversal of the judgment on this ground.

Sampley's second argument similarly fails. He contends that the trial court was required to conduct a trial within a trial, i.e., Kreis was required to prove not only that Sampley acted in a negligent manner but also that his negligence resulted in damage to her in the loss of a viable cause of action against defendants who would be able to satisfy the judgment. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 832-833.)

Once again, Sampley asks us to presume there was no evidence presented on this issue and the trial court failed to follow the "trial within in a trial" model. From this record, we simply cannot make such a presumption. The absence of a reporter's

transcript or a settled statement prevents us from knowing what evidence was presented at trial. For all we know, the trial court followed the "trial within in a trial" model and more than adequate evidence was presented on each of these issues. We are required to presume that such evidence was presented and the trial court's judgment is correct.

The tactical decision to waive the presence of a court reporter carries with it certain risks. One of those risks is that it is virtually impossible to challenge any judgment as unsupported by sufficient evidence. Despite using different language, Sampley essentially is arguing just that. The lack of a reporter's transcript or a settled statement dooms such arguments to failure.

DISPOSITION

The judgment is affirmed. Kreis is awarded her costs on appeal.

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CORNELL, J.

WE CONCUR:

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LEVY, Acting P.J.

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GOMES, J.